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## THE CASE FOR THE NEBRASKA MERIT PLAN

Virgil J. Haggart, Jr. \*†

This article is written in the hope that it will be helpful to members of the Nebraska Bar in familiarizing themselves with a proposed constitutional amendment, to be submitted to the electorate in November of this year, which provides for a change in the method of selection of the chief justice and judges of the supreme court, and of district judges and such other judges as the legislature may provide. The system provided for in the proposed amendment has been designated the "Nebraska Merit Plan," and has the active support of the Nebraska State Bar Association.

Members of the Bar undoubtedly will be consulted by their clients and other interested voters as to their opinion of the principles embodied in the Nebraska Plan. Hence an attempt has been made not only to consider the specific provisions of the proposed constitutional amendment, but also to review the history and development of the Plan and other similar plans, to anticipate some of the arguments pro and con which may be raised concern-

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† In addition to those articles cited in the text of this article, the following writings concerning the Merit Plan of judicial selection and tenure are to be noted: Bundschu, *The Missouri Non-Partisan Court Plan*, 16 KAN. CITY L. REV. 55 (1948); Elliott, *Judicial Selection and Tenure*, 3 WAYNE L. REV. 175 (1957); Ewing, *Non-Partisan Selection of Judges*, 34 CHI. B. REC. 465 (1953); Gershenson, *Experience in Missouri with Judicial Selection under the Non-Partisan Plan*, 46 A.B.A.J. 287 (1960); Gershenson, *Reply Concerning Missouri Court Plan*, 33 FLA. B.J. 22 (1959); Lyman, *Connecticut and Missouri Plan*, 30 CONN. B.J. 390 (1956); Moran, *Counter-"Missouri Plan" For Method of Selecting Judges*, 32 FLA. B.J. 471 (1958); Schrader, *Judicial Selection: Taking the Courts Out of Politics*, 46 A.B.A.J. 1115 (1960); Stason, *Judicial Selection in Perspective*, 38 CHI. B. REC. 247 (1957); Stason, *Judicial Selection Around the World*, 41 J. AM. JUD. SOC'Y 166 (1951); Tucker, *Judges—Selecting the Best Men*, 6 FLA. L. REV. 195 (1953); Wedell, *Non-Political Selection of Justices*, 26 KAN. S.B.J. 355 (1958); Winters, *Better Ways to Select Our Judges*, 34 J. AM. JUD. SOC'Y 166 (1951); Winters, *The New Mexico Judicial Selection Campaign—A Case History*, 35 J. AM. JUD. SOC'Y 166 (1952); Wormuth & Rich, *Politics, The Bar, and the Selection of Judges*, 3 UTAH L. REV. 459 (1953).

ing the Plan and to discuss the experience with similar plans which have already been adopted in other jurisdictions.

## I. HISTORY AND DEVELOPMENT OF THE PLAN

### A. GENERALLY

The system of judicial selection and tenure which is contemplated by the Nebraska Plan apparently received its first public recognition with the founding of the American Judicature Society in 1913. The Society was organized for the major purpose of improving the administration of justice, and with the stated intention of dealing with the matter of selection, tenure and retirement of judges.<sup>1</sup>

In his book entitled *UNPOPULAR GOVERNMENT IN THE UNITED STATES*, published in 1913, Professor Albert M. Kales of the Northwestern University Law School, one of the founders of the American Judicature Society, proposed that an elected officer (he suggested an elected chief justice) fill judicial vacancies by appointment from a list of names to be submitted by an impartial, non-partisan nominating body (he suggested a judicial council), and that the appointees go before the voters at stated intervals thereafter on the sole question of their retention in office. Under Professor Kales' plan, the rejection of any judge by the electorate would create a vacancy which again would be filled by appointment.<sup>2</sup>

In 1934, the American Bar Association sent questionnaires to 1,430 bar associations throughout the country, asking whether a change in the existing methods of selection of judges would be desirable. The results showed that in those states where judges were appointed rather than elected, there was no dissatisfaction with the existing system. However, in those states where judges were elected, there was complaint and desire for a change. The objections to the elective system were: political influence outweighs merit in the election of judges; it is not possible in state-wide elections, or in urban elections, for voters to estimate the qualifications of the candidates; judges are intimidated by political leaders; and lawyers of higher qualifications are not attracted to a career on the bench under an elective system.<sup>3</sup>

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<sup>1</sup> Brand, *Selection of Judges—The Fiction of Majority Election*, 34 J. AM. JUD. SOC'Y 136, 137 (1951). This article is substantially a reprint of Mr. Brand's address to the 1950 Annual Meeting of the Nebraska State Bar Association. The address is also reprinted in 30 NEB. L. REV. 195 (1950).

<sup>2</sup> Winters, *Selection and Tenure of Judges*, 16 KAN. S.B.J. 1 (1947).

<sup>3</sup> Harris, *In Support of the Pennsylvania Plan For the Selection and Tenure of Judges*, Pa. Bar Ass'n, March 1, 1961, p. 11.

Also, in 1934, California adopted its present plan of initial appointment of its appellate court judges by the governor with the approval of a special commission consisting of the chief justice, the presiding judge of the district court of appeal and the attorney general.<sup>4</sup>

In 1937 the American Bar Association gave its powerful support to the so-called "Merit Plan" of judicial selection and tenure by endorsing the following plan:

- a. The filling of judicial vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.
- b. If a further check upon appointment is indicated, such check may be supplied by the requirement of confirmation of the state senate, or other legislative body, of appointments made through the dual agency suggested.
- c. After a period of service the appointee should be eligible for reappointment periodically, or go before the people on his record, with no opposing candidate, upon the question: "Shall Judge \_\_\_\_\_ be retained in office?"<sup>5</sup>

The "Merit Plan" probably received its greatest impetus to date with the adoption of the "Missouri Plan" in 1940. The "Missouri Plan" provides for the filling of judicial vacancies in the supreme court, the courts of appeals, and the circuit courts of St. Louis and Kansas City by appointment by the governor from a list of names submitted by a nominating commission. For the supreme court and appellate court judges, the commission consists of the chief justice, three lawyers elected by the Bar, and three laymen appointed by the governor. For the circuit judges, it consists of the presiding justice of the appropriate court of appeals, two members of the local Bar, and two local citizens appointed by the governor. Sixty days prior to the general election preceding the expiration of the judge's term, he may file a declaration to succeed himself, in which case his name is submitted without party designation to the voters on a separate ballot which reads: "Shall Judge \_\_\_\_\_ be retained in office? Yes \_\_\_\_\_ No \_\_\_\_\_" If a majority of the votes are "Yes" the judge is elected for another term; if the majority is "No," or if he does not file a declaration, there is a vacancy which is again filled by appointment.

In 1958 the voters of Kansas adopted a Merit Plan system for

<sup>4</sup> Brand, *Selection of Judges—The Fiction of Majority Election*, 34 J. AM. JUD. Soc'y 136, 139 (1951).

<sup>5</sup> Winters, *Selection and Tenure of Judges*, 16 KAN. S.B.J. 1 (1947).

the selection of supreme court judges. Judges are appointed by the governor from a list submitted by a judicial nominating commission. If the governor fails to make an appointment from the list submitted within sixty days, the chief justice is required to appoint from the same list. The nominating commission consists of one lawyer-member at large chosen by the members of the Bar who are residents of and licensed to practice in Kansas; one lawyer-member from each congressional district chosen by the resident members of the Bar in that district; and one member who is not a lawyer from each congressional district, who is appointed by the governor from among the residents of that district. Prior to the first general election after he has been in office for at least one year, an appointee may declare for a full term on the bench. If he does so, the question on the ballot is simply whether the judge shall be retained in office. If the majority votes "Yes," he is retained; if the majority vote is "No," or if the incumbent does not file a declaration, a vacancy exists to be filled by the appointive procedure already outlined.

Merit Plan systems of judicial selection have also been adopted in recent years in Alabama and Alaska, and presently are under consideration in numerous other states, including Iowa and Illinois.

#### B. THE MERIT PLAN IN NEBRASKA

The subject of a Merit Plan for the selection of judges has been a matter of official interest to the Nebraska State Bar Association for many years. At the Association's annual meeting in 1950, a resolution was adopted that the Association go on record as favoring the adoption of the American Bar Association Plan for Selection and Tenure of Judges. It was also resolved that a referendum of the members of the Association be conducted, and that if a majority of the members favored the Plan, "the Association assume the responsibility of sponsoring such legal and other action as may be necessary to bring the Plan into existence in Nebraska."<sup>6</sup> The Merit Plan was likewise the subject of one of the major addresses delivered at the Association's 1950 annual meeting.<sup>7</sup>

The referendum called for by the 1950 resolution was carried out, and it was found that more than two-thirds of the members of the Association who responded favored the Plan.<sup>8</sup> Conse-

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<sup>6</sup> *Report of the Special Committee on Judicial Selection*, 30 NEB. L. REV. 366 (1951).

<sup>7</sup> Brand, *Judicial Selection*, 30 NEB. L. REV. 195 (1951).

<sup>8</sup> A total of 1,313 ballots were cast; 931 voted in favor of the Plan, 380

quently, a proposed constitutional amendment was prepared by the Association's Judiciary Committee,<sup>9</sup> and petitions were circulated by members of the Association to place the proposal on the ballot in the 1954 general election. This effort failed when only about eighty-seven per cent of the required number of signatures was obtained upon the petitions.<sup>10</sup>

The Association's support of the Merit Plan continued, however, and in 1958 the Judiciary Committee again prepared a proposed constitutional amendment.<sup>11</sup> It was decided that instead of attempting to obtain the necessary signatures to place the proposal on the ballot by the petition method, it would be more expedient to submit it to the Judiciary Committee of the Nebraska Legislature during the 1959 session.<sup>12</sup> The proposed amendment was not favorably acted upon by the committee. One member of the committee expressed the opinion that the measure failed because it was too detailed and complex;<sup>13</sup> another stated that he opposed the measure because the implementation of the plan was spelled out in the bill submitted, rather than being left to the discretion of the legislature.<sup>14</sup>

The Association's support of the Merit Plan was discussed at length from the floor during its 1959 annual meeting. It was decided that an intensive effort should be made to educate both the members of the Bar and the public at large in Nebraska.<sup>15</sup> Accordingly, a State Conference on Judicial Selection and Court Administration was held at the University of Omaha in June of 1960. The conference, sponsored by the Association and the Judicial Council of Nebraska, was attended by judges, lawyers and selected lay leaders from throughout the state. After three days of intensive study of the Merit Plan, it was the consensus of the conference that the Merit Plan form of judicial selection and tenure should be adopted in Nebraska.<sup>16</sup>

Once again the Association undertook the active support of the Plan. A special committee on Judicial Selection and Tenure

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voted against it, and two voted for the Plan with qualifications. *Report of the Special Committee on Judicial Selection*, 31 NEB. L. REV. 165 (1952).

<sup>9</sup> *Report of the Committee on the Judiciary*, 33 NEB. L. REV. 183 (1954).

<sup>10</sup> 34 NEB. L. REV. 218 (1955).

<sup>11</sup> *Report of the Committee on Judiciary*, 38 NEB. L. REV. 77 (1959).

<sup>12</sup> *Ibid.*

<sup>13</sup> 39 NEB. L. REV. 64 (1960).

<sup>14</sup> *Id.* at 65.

<sup>15</sup> *Id.* at 62-71.

<sup>16</sup> This consensus is reproduced in full in Appendix A to this article.

was appointed to prepare and submit a proposed constitutional amendment to the Judiciary Committee of the 1961 Nebraska Legislature. Both the president-elect and the immediate past president served on the committee, and Hale McCown, then President of the Association, attended most of its meetings. The committee worked in close co-operation with members of the legislature's Judiciary Committee. The chairman of the latter committee, Senator Joe T. Vosoba of Wilber, actively participated in the drafting of the measure, and was instrumental in guiding it through his committee and through the legislature. The finished product, LB 315, contained all of the essential characteristics of the Merit Plan, yet was much more simplified than previous measures had been. It was sponsored by Senators Vosoba, McHugh, and Russillo. It was approved without dissent by the Judiciary Committee of the legislature.

Members of the Association throughout the state bent every effort to obtain the support of their local state senators for LB 315. The Nebraska District Judges' Association, the Nebraska League of Women Voters and many other responsible groups endorsed the measure. An interested and informed legislature passed LB 315 by a vote of 35 to 7.

## II. ANALYSIS OF THE PROPOSED AMENDMENT

The full text of LB 315,<sup>17</sup> the proposed constitutional amendment to provide for the Nebraska Plan, is reprinted in Appendix B to this article.

### A. TECHNICAL AND OTHER AMENDMENTS

The amendments to Article IV, section 11, and to Article V, sections 4, 7, 15 and 20 of the Nebraska Constitution, which are proposed in section 2(1) and (2) of LB 315, are merely technical amendments, intended to bring the terminology of the affected sections into harmony with the provisions of the Nebraska Plan.

The proposed amendment to Article V, section 5 of the Nebraska Constitution eliminates the outdated reference to the six congressional districts formerly contained within the state. It also eliminates the provisions adopted in 1920 which established the mechanics for staggered terms for supreme court judges. The system of staggered terms now being in full effect, these provisions have become superfluous; the Nebraska Plan would not alter this system.

In addition to technical amendments intended to bring the section into conformity with the Plan, the proposed amendment

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<sup>17</sup> Neb. Laws c. 25a, p. 741 (1961).

to Article V, section 10, eliminates the provision that district judges shall serve a term of four years. As will be more fully discussed in subsequent paragraphs of this article, the Plan would increase the term of district judges to six years.

It should be noted that the municipal courts which exist in Nebraska cities of the metropolitan and primary classes are not specifically provided for in the constitution, and have been created by the legislature.<sup>18</sup> If it is believed that there should be a change in the term of office or in the manner of selection of municipal judges, presumably the appropriate changes can be made by the legislature without a specific enabling constitutional provision.<sup>19</sup>

No change is proposed in the constitutional provisions relating to justices of the peace.

Article V, section 27 of the Nebraska Constitution, which provides for the establishment of a separate juvenile court, authorizes the legislature to fix the term, qualifications, and method of selection of judges of that court. If the Merit Plan method should be applied to the selection of these judges, therefore, it appears that it is within the power of the legislature so to provide.

#### B. THE NEBRASKA PLAN

A new section 21, containing the heart of the Nebraska Plan, would be added to Article V of the Nebraska Constitution by the proposed amendment.

The amendment proposes that in the case of any vacancy in the supreme court or in any district court, or in any other court which might be included in the Plan by legislative action, the vacancy shall be filled by appointment by the governor from a list of at least two nominees submitted to him by a judicial nominating commission. If the governor fails to make such an appointment within sixty days after the list is presented to him, the chief justice or acting chief justice of the supreme court is required to make an appointment from the same list. The intent of the latter provision is to render it unavailing to a governor to refuse to make an appointment from the list submitted for political reasons or personal motivations.

The proposed amendment further provides that at the general election next following the expiration of three years from the date of appointment of any judge under the Plan, and each six years

<sup>18</sup> NEB. REV. STAT. § 26-101 ff. (Supp. 1956).

<sup>19</sup> *State v. Hunter*, 99 Neb. 520, 156 N.W. 975 (1916); *State v. Board of County Comm'rs*, 109 Neb. 35, 189 N.W. 639 (1922).



thereafter, the judge will be required to submit himself to the electorate on the question of whether or not he shall be retained in office for an additional term. A three-year "probationary" period is provided for so that a judge will have ample opportunity to familiarize himself with the duties of his office, and to demonstrate his qualifications for it. The three-year period is also calculated to enable the electorate fully to evaluate the judge's competence before being called upon to decide whether he shall be allowed to remain in office.<sup>20</sup>

Inherent in the Plan is the extension of the term of district judges from four to six years. The purpose of this provision is simply to enable district judges to devote as much of their time as possible to their professional responsibilities without the distraction attendant even upon a public referendum on the question of their retention in office. Moreover, no valid reason was seen for restricting district judges to a shorter term than that provided for supreme court judges. The common law and statutory bases for removal from office for cause would, of course, be unaffected by the Plan.

Authority is delegated to the legislature under the Plan to prescribe the form in which the question of retention or rejection of a judge would appear on the ballot. In the case of the chief justice of the supreme court, the question of retention in office would be voted upon by the electorate of the entire state; with respect to judges of the supreme court, the question would be submitted to the voters of the supreme court judicial district from which the judge was selected. Voters of the district court judicial district from which the judge was selected would decide whether or not a district judge was to be retained in office. Thus, no change in the present state-wide pattern of selecting the chief justice and district-wide pattern of selecting supreme court and district court judges is contemplated by the Plan.

The Plan provides that all judges subject to the Plan who are in office on the effective date of the Plan, whether by election or appointment, shall be deemed to have been once approved for retention in office by the electorate, and shall be required only to submit themselves for retention or rejection at the end of their regular term and every six years thereafter. The Plan, therefore, will have no effect upon the right of incumbent judges to retain their offices for the remainder of the term for which they were elected or appointed prior to the adoption of the Plan.

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<sup>20</sup> Experience under the Missouri Plan has proved the wisdom of a probationary period prior to a referendum. Hyde, *The Missouri Method of Choosing Judges*, 41 J. AM. JUD. Soc'y 74, 75-76 (1957).

The Plan provides that the all judicial nominating commissions shall consist of seven members. The chairman of each commission shall be a judge of the supreme court to be appointed by the governor. The six remaining members of each commission must be residents of the area from which the judge is to be selected; in the case of the chief justice, the area would be state-wide; with respect to judges of the supreme court and district courts, the relevant area would be a supreme court or district court judicial district. Three members of each commission would be lawyers residing in the area from which the judge was to be selected; these lawyers would be designated by the members of the bar residing within that area. The remaining three members would be citizens not admitted to practice law in the state, who would be appointed by the governor from among the residents of the area. The terms of office of members of all commissions would be staggered, and the length thereof would be established by the legislature.

In order to eliminate any possibility of internal politics within any commission, the Plan provides that no nominee of a commission can be a member of the commission nor can he have been a member of the commission for two years preceding his nomination; the legislature is given authority to extend this period of disqualification if it sees fit.

### III. ARGUMENT FOR THE NEBRASKA PLAN

#### A. ADVANTAGES OF THE PLAN

##### (1) *Judicial Office Removed from Politics*

The most obvious argument in favor of Merit Plan systems such as the Nebraska Plan is that it is the best method yet devised to take judicial office out of the political arena. It may be contended that since judges are now elected in Nebraska on a non-partisan ballot, judicial office in the state is not subject to political pressures. This argument may be superficially appealing, but upon closer examination it must be found to be fallacious.

While conceding that the non-partisan system of election does free judicial office from some of the evils of party politics, one observer believes that such a system is inferior to a partisan system because the voters are deprived of party responsibility for the judicial candidates nominated.<sup>21</sup> Another writer has suggested that a non-partisan system of judicial election exposes the electorate to

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<sup>21</sup> Winters, *Selection and Tenure of Judges*, 16 KAN. S.B.J. 1 (1947).

appeals made on the basis of race, religion, "and other political irrelevancies."<sup>22</sup>

It is possible that under the Nebraska Plan, governors would tend to appoint members of their own political party to office. This is not a valid objection to the plan, per se. The governor's choice would be limited to the individuals named by the nominating commission. Four of the seven members of each commission would be members of the Bar: one judge of the supreme court and three practicing attorneys. It is unlikely that a member of the highest court in the state would subordinate an objective evaluation of a prospective nominee's professional qualifications to political considerations. It is likewise unlikely that the lawyer members of a commission, entrusted by their fellow members of the profession with the selection of well-qualified nominees, would breach their obligation for political reasons.

All of the objectives of the Nebraska Plan would be attained at the time a list of nominees of high competence was submitted to the governor by the nominating commission. It would not be within the power of the governor to defeat these objectives, and the political affiliation of the individual appointed by him would be of no consequence.

## (2) *More Knowledgeable Selection*

Unquestionably the Nebraska Plan would result in better-informed selection of judges and nominees for judicial office. The Plan contemplates the establishment of standing judicial nominating commissions. It would be the public trust and responsibility of the members of these commissions to keep themselves fully informed at all times with respect to the qualifications, competence and reputations of potential nominees within their districts. There is no reason to believe that the commission members would be derelict in their duties, but if found to be so, they could be removed and replaced readily.

The belief that the electorate is well informed as to the qualifications of the individuals whom they elect to judicial office has been proved to be fallacious. In 1954, the Bar Association of the City of New York conducted a survey which was completed within ten days following the November general election. Four hundred and ninety-seven persons were interviewed in New York, 401 in Buffalo (1960 population: 560,000), and 402 in Cayuga County in upstate New York. (The population of Cayuga County in 1960 was

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<sup>22</sup> Raymond Moley, as quoted in Brand, *Judicial Selection*, 30 NEB. L. REV. 195, 204-05 (1951).

74,500, and the largest city in the county is Auburn, which had a 1960 population of 37,000.) Among others, the following questions were asked:

1. Had you paid any attention to who was running for judgeships before you went to vote, or had you just paid attention to the candidates for the other offices?
2. What judges do you remember voting for last Tuesday?

The response to these questions were as follows:

	New York	Buffalo	Cayuga County
Question 1: Yes, had paid attention to judicial candidates	39%	52%	25%
Question 2: Could name one or more judicial candidates voted for	19%	30%	4%

The same individuals were asked to name any court for which judges had been elected. In New York only twenty per cent were able to do so; in Buffalo, only eleven per cent; in Cayuga County, only fourteen per cent.

Perhaps a clearer picture is given when the above percentages are inverted. Not only were the vast majority of voters unable to name a single judicial candidate for whom they had voted, but also eighty per cent in New York City, eighty-nine percent in Buffalo and eighty-six per cent in Cayuga County were unable to name any court to which judges had been elected! Even more dismaying is the fact that sixty-one per cent of the New York City voters, forty-eight per cent of the Buffalo voters, and seventy-five per cent of the Cayuga County voters admitted that they had paid no attention to the candidates for judicial office.<sup>23</sup>

The electorate of New York State was obviously uninformed as to the qualifications of candidates for judicial office. Unfortunately, there is no reason to believe that the voters of Nebraska are better informed. A true democratic form of government must be founded upon an informed electorate; without this foundation, it is a sham. It appears that in the case of judicial office, true democratic processes are no longer operative. If this be true in Nebraska, the adoption of the Nebraska Plan is not merely desirable; it is imperative.

<sup>23</sup> Klotz, *The Selection of Judges and the Short Ballot*, 38 J. AM. JUD. Soc'y 134, 142-43 (1955). See also Harris, *In Support of the Pennsylvania Plan for the Selection and Tenure of Judges*, Pa. Bar Ass'n, Philadelphia, Pa. 4-5 (1961).

### (3) *Better Qualified Candidates*

Not only would the selective process be improved by adoption of the Nebraska Plan, but also better qualified lawyers would become available as potential nominees for judicial office.

Many lawyers who are eminently qualified for judicial office refuse to make themselves available under the present system simply because they have no stomach for the campaigning which is necessary for election; perhaps they feel that stumping, baby-kissing, advertising and glad-handing are debasing to the learned profession which they hold in such high esteem. Or perhaps they feel that financially they cannot afford to abandon their practices for several months to engage in a campaign which may, or may not, result in their election to office. Or perhaps they feel that an unsuccessful campaign would damage their professional reputations among present and potential clients. Or perhaps they feel that, if elected, they could not discharge their judicial responsibilities impartially and objectively because their office would be subject to the political pressures previously discussed. All of these legitimate objections to the elective method of judicial selection which exist among many lawyers of the highest professional competence would be removed by the adoption of the Nebraska Plan. It is reasonable to believe that thereupon many of these men would make themselves available for judicial office, and that the caliber of the Bench would be improved correspondingly.

Moreover, adoption of the Plan would probably result indirectly in an increase in the compensation paid for the offices subject to it. Since the only issue at election time would be whether the incumbent is qualified to remain in office, and since there would be no opponent whose campaign efforts and expenditures would have to be matched and bettered, the incumbent's outlay in the "campaign" for re-election under the Nebraska Plan would be greatly reduced, if not eliminated entirely. This saving would result in a higher "net" salary for judicial offices under the Plan, and it could be expected that such offices would become more attractive to well-qualified lawyers not theretofore available for financial reasons.

### (4) *Emphasis on Professional Ability*

Inherent in the Nebraska Plan is a shift of emphasis from political ability to professional ability as the prime qualification for judicial office. It is a plain fact that the indispensable prerequisite to holding judicial office under an elective system is political ability—the ability to get elected and re-elected in the face of intense, per-

sonal opposition by other candidates. This ability to get elected, unfortunately, bears little relation to the ability to serve as a competent judge. It may be possible that a good judge can become a good politician, but it is much more unlikely that a good politician can become a good judge; under the elective system, it is the latter rather than the former problem which exists, to the detriment of the people.

The Nebraska Plan would resolve the dilemma simply by removing the requirement of political ability as a prerequisite to holding judicial office. The makeup of the nominating commission assures that persons possessed of the capacity to perceive potential judicial competence will be in the majority, and that they will be bound by their professional honor to make their selections on that basis.

#### (5) *More Time for Judicial Duties*

The necessity for campaigning being largely eliminated by the Nebraska Plan, judges holding office under the Plan would be free to devote their full time and attention to their judicial duties. Not only would the necessity for a flurry of political activity at election time be removed, but also the obligation which many judges feel to make public appearances and speeches, and to engage in other activities calculated to maintain their public images throughout their terms, would be eliminated.

The result would be a more single-minded Bench, capable of dispensing more speedy justice, and of keeping their dockets more current than they now are in some parts of the state.

### B. POPULAR MISCONCEPTIONS

#### (1) *That Appointment of Judges is "Undemocratic"*

Undoubtedly there will be a hue and cry in some quarters that the Nebraska Plan is "undemocratic" because it provides for the appointment, rather than the election, of judges. Plainly stated, an argument to this effect is balderdash.

With the exception of a few cantons in Switzerland, the United States is the only democracy in the world where any judge holds office by election rather than appointment.<sup>24</sup>

In England, the cradle of our common law heritage, all judges are appointed to office.

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<sup>24</sup> Harris, *In Support of the Pennsylvania Plan*, Pa. Bar Ass'n Philadelphia, Pa. 3 (1961).

Even in the United States, acceptance of the elective system of judicial selection is far from universal. The federal courts, in which all judges are and always have been appointed, comes to mind immediately. Nearly everyone would agree that the federal judiciary has generally been of high caliber since the founding of the Republic. Great jurists such as Marshall, Taney, Holmes, Brandeis, Cardozo, Learned Hand and many others all made their most notable contributions to American jurisprudence while sitting on the Federal Bench. Experience has proved the wisdom of the framers of the Constitution in providing only for the appointment of judges.

Judges in the original thirteen colonies were appointed in each instance, sometimes by the governor, sometimes by the legislature and sometimes by special commissions consisting of members of both the executive and legislative branches.<sup>25</sup>

Generally speaking, until about 1845 the judges of the state courts were appointed by the governors, subject to the approval of the legislatures. Commencing in about 1846, however, the ultra-democratic Jacksonian movement began to have an impact on judicial selection methods. In that year New York adopted the elective method, and in the years that followed many other states did likewise, with the result that at the outbreak of the Civil War, twenty-two of thirty-four states elected their judges. These twenty-two included all of the newly admitted states, but the older Atlantic seaboard states retained the appointive method. It has been said that in this period "democracy became synonymous with the ballot." The trend continued until the early part of the twentieth century, when dissatisfaction with the elective method gave birth to the development of the Merit Plan, which has been discussed in an earlier part of this article.<sup>26</sup> With the adoption of the Merit Plan system with respect to certain courts in California, Missouri, Alabama, Alaska and Kansas since 1934, it is correct to say that the elective trend has been halted, if not reversed. Merit Plan systems are receiving thoughtful consideration and active support in many states at this time.

At the present time, Nebraska and about nineteen other states elect all their judges by popular vote; in about twenty-eight states, some judges are elected and some are appointed; in two states (Massachusetts and New Hampshire), all judges are appointed.

Thus in about sixty per cent of our states an appointive system of judicial selection is now in operation to a greater or lesser extent.

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<sup>25</sup> Winters, *Selection and Tenure of Judges*, 16 KAN. S.B.J. 1 (1947); Brand, *Selection of Judges—Fiction of Majority Election*, 34 J. AM. JUD. SOC'Y 136 (1951).

<sup>26</sup> *Ibid.*

The appointive system has been in use in some of our states since the beginning of our history as a nation; the fact that it is still in use in most states which adopted it initially indicates that it has worked effectively and well. The appointive system of judicial selection is and has been as much a part of our form of government as the elective system. There is nothing "undemocratic" about it.

(2) *That the People Will Be Deprived of Their Franchise*

It can be expected that some will say that the Nebraska Plan would strip the people of their "constitutional right" to vote for judicial candidates. It is indeed true that under the Nebraska Constitution as it now is written, the people have a right to vote for all judicial candidates. But it should be borne in mind that provisions of the Constitution are neither sacrosanct nor immutable. Sovereign power to amend the Constitution resides in the people, and if an enlightened electorate chooses to change the existing method of judicial selection in Nebraska, no citizen has standing to complain.

With reference to this contention, it is worthwhile to note that there is no public outcry when the Governor exercises his prerogative to fill a judicial vacancy by appointment for the remainder of the term. In fact experience shows that most judges originally appointed in this manner who wished to continue in office have been returned to office at the expiration of their terms by popular election.

Moreover, the Nebraska Plan *would not* in fact deprive the citizen of his right to vote on any candidate for judicial office. It would merely change the nature of the question to be voted upon from that of *election to office* to that of *retention in office*. If a judicial officeholder proves to be incompetent or corrupt or otherwise unqualified, the voters would have precisely the same right to remove him that they have always had.

(3) *That a Judge Should Be Responsible to the Will of the People*

Many people seem to believe that a judge should be responsible to the will of the people, and that this is the justification for election of judges by popular vote. This belief is entirely incompatible with a proper concept of American jurisprudence. *Simply stated, a judge is not responsible to the will of the people, but rather to the law.* It has been more eloquently stated as follows:

The solid reasons which require direct election in the other branches of government do not exist in the judicial. The judge is not, in the usual sense, a servant of the people, but rather a servant of the law, a guardian of our constitution, and an impartial



magistrate between litigants. The functions of the various departments of government differ. It is the legislative and executive which represent, enact and execute the mandates of the majority public opinion. It is not the function of the judiciary to represent, enact and execute current views. No policy making or question of majority rule is involved. On the contrary, courts must at times protect minorities and decide against the popular prevailing view and restrain the power of the temporary majority. The courts represent all of the people.<sup>27</sup>

Every lawyer recognizes the truth of the foregoing statement. Every lawyer realizes that in some cases the courts do not function as they should because of political pressures brought to bear on judges. The Nebraska Plan would go far toward removing this obstacle to the proper administration of justice.

### C. EXPERIENCE ELSEWHERE

It is probably too early to assess the operation of the Merit Plan systems of selection of judges which recently have been adopted in Kansas, Alabama and Alaska. But plans have been in operation in California since 1934 and in Missouri since 1940, and it is clear that both the public and the members of the Bar in both states consider them superior to the former elective method of judicial selection.

The California system, as previously noted, calls for the appointment of appellate court judges by the governor with the ratification of a special commission. Judicial nominating commissions are not provided for. Nevertheless, the California system appears to have functioned satisfactorily. In an informal poll of selected California lawyers conducted in 1948, it was found about seventy-eight per cent of those responding approved of the system, and would vote for it again. Of the remainder, only twenty-five per cent wanted to return to the elective system and seventy-five per cent wanted to adopt a system similar to the Missouri Plan.<sup>28</sup>

The Missouri Plan, providing as it does for appointment by the governor from a list of nominees submitted by a judicial nominating commission, is more similar in concept to the Nebraska Plan than is the California system. The experience in Missouri has been very satisfactory. At the outset, Missouri governors tended to appoint individuals only of their own political affiliation to judicial office, but this tendency appears to have been corrected in more recent years.

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<sup>27</sup> Harris, *In Support of the Pennsylvania Plan*, Pa. Bar Ass'n Philadelphia, Pa. 6 (1961).

<sup>28</sup> 31 J. AM. JUD. Soc'y 181 (1948).

The public has demonstrated that it is satisfied with the Missouri Plan. It was originally adopted in 1940 by a majority of 90,000 votes. Opponents of the plan were able to get it resubmitted to the electorate in 1942, and it was re-approved by a majority of 180,000. A new Missouri Constitution, containing the plan as originally adopted in 1940, was adopted in 1945 by a majority of 150,000.<sup>29</sup>

James M. Douglas, former Chief Justice of the Missouri Supreme Court, who served under both the former elective system and the present plan, has said this of the Missouri Plan:

In my opinion, the Missouri Court Plan is continuing to be the most successful plan yet devised for the selection and tenure of judges. It has taken judges completely out of the partisan politics . . . . The plan has attracted to the bench outstanding and successful lawyers.<sup>30</sup>

Former Chief Justice Roscoe P. Conkling, who gave up a successful law practice to accept an appointment to the Missouri Supreme Court, and who would not have done so had it been necessary for him to campaign for office, has stated:

Our plan preserves the independence of the judiciary as a separate branch of our state government, vigilant to protect and enforce the rights of all citizens. . . . [J]udges devote their entire energies to judicial work, conscious that their tenure depends only upon a good record upon the bench and not upon political affiliation or the success of political parties.<sup>31</sup>

Chief Justice Laurance M. Hyde of the Missouri Supreme Court has expressed his opinion of the Missouri Plan in these terms:

I think an outstanding feature of the plan is that it makes it possible for every judge to be a better judge . . . because he does not have to put in any time campaigning and can give all his time to his judicial work. Our judges can now always be working on the next case instead of on the next election. Furthermore, judicial qualities have been substituted for party affiliation as the principal basis for selecting and retaining judges. . . . A judge does not have to worry about maintaining political fences. The result of all this is that all of our appellate court dockets have been brought up to date for the first time in half a century, and are being kept on a current basis. Improvements have been made in bringing the circuit court dockets up to date. . . . Delays have been lessened and the expense of litigation reduced. The adoption of this plan is undoubtedly the greatest improvement that has ever been made in the judicial system in this state.<sup>32</sup>

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<sup>29</sup> Winters, *Selection and Tenure of Judges*, 16 Kan. S.B.J. 1 (1947).

<sup>30</sup> As quoted in Harris, *In Support of the Pennsylvania Plan*, Pa. Bar Ass'n, Philadelphia, Pa. 25 (1961).

<sup>31</sup> *Id.* at 26.

<sup>32</sup> *Ibid.*

#### IV. CONCLUSION

The Nebraska Plan has been evolved after many years of careful study and untiring effort by the Nebraska State Bar Association and numerous individual members thereof. It has been overwhelmingly approved by the elected representatives of the people of this state in the legislature. It already has the endorsement of many responsible, public-spirited civic and professional organizations. Its only objective is the improvement of the judiciary and of judicial administration in this state. It is the responsibility of all lawyers in Nebraska carefully to familiarize themselves with the provisions of the Plan. After they have done so, it is believed that they will render their whole-hearted and active support to the adoption of the Plan at the November election, and that in doing so they will have rendered a valuable service to the people of this state and to the profession.

### APPENDIX A

#### CONSENSUS OF THE CONFERENCE ON JUDICIAL SELECTION AND COURT ADMINISTRATION JUNE 9, 10 AND 11, 1960

#### JUDICIAL SELECTION AND TENURE

In order to obtain judges of the highest judicial calibre it is necessary that they be selected solely on the basis of merit. Selection through popular election does not appear to be best suited to achieving this end. This is so because, unlike the legislative and executive branches of government, the judiciary is not, in the strictest sense, a policy making body but is a group engaged in a highly specialized and technical function. The electorate cannot, nor can it be expected to, judge adequately whether a person is fitted for judicial office.

It is no doubt true that the elective system can be strengthened through the Bar recommending certain of the candidates for judgeships as well qualified and widely promulgating these recommendations to the electorate. Nevertheless, judges are still subject to pressures and the necessity of expensive and time-consuming campaigns. Bar support of a candidate does not appear to reduce these

pressures significantly. Indeed, many lawyers feel that bar recommendation of a candidate is often misunderstood by the public, and may be an actual hindrance to the approved candidate's chance of election.

The so-called "Missouri Plan" or American Bar Association plan eliminates the undesirable features of the present elective system by providing for the filling of vacancies through appointment by the governor from nominations submitted by a nonpartisan commission composed of judges, lawyers, and laymen. Yet, the tenure of judges is still subjected to the vote of the people at a noncompetitive election at which each judge must run on his record at the end of his term.

From our discussion with the five panels, we have concluded that both lawyers and laymen attending the Conference are overwhelmingly of the opinion that such an appointive plan is in the best interest of the public. It was generally agreed that this plan is the most effective way to express the composite judgment of a group which is best acquainted with those who will make competent judges. In addition, the judicial tenure under the plan is a strong inducement to obtain qualified persons who would be unwilling to subject themselves to the difficulties and insecurity of a competitive election.

There exists the question whether the appointive system of selection should be adopted statewide or only in the most populous areas. It is, of course, true that the need for the appointive plan may not be so pressing in rural areas because, generally speaking, the elective system has produced acceptable judges in these areas. Nevertheless, pressures are present in rural areas, and it is almost universally agreed that the appointive plan is desirable on a statewide basis.

In order to secure acceptance of the appointive system in Nebraska, much more education of the public as to the potential shortcomings of the present system must be accomplished. This can be done only if the bar, and in particular the present judiciary, form a solid front behind the plan and actively work for its adoption.

## APPENDIX B

### Legislative Bill 315

INTRODUCED BY JOE T. VOSOBA, 23RD DISTRICT; EDWIN T. McHUGH, 3RD DISTRICT; MICHAEL P. RUSSILLO, 9TH DISTRICT

AN ACT for submission to the electors of an amendment to Article IV, section 11, and Article V, sections 4, 5, 7, 10, 15, 20 and 21 of the Constitution of Nebraska relating to the judiciary; to provide for the appointment of the Chief Justice and Judges of the Supreme Court, of the judges of the district court and of such other judges as the Legislature shall provide; to provide terms of office for the judges so appointed; to provide for the approval or rejection of such judges by the electorate; to provide for the submission of the proposed amendments to the electors at the general election in November, 1962; to provide for the manner of submission and form of ballot; and to provide the effective date thereof.

*Be it enacted by the people of the State of Nebraska,*

Section 1. That at the general election in November, 1962, there shall be submitted to the electors of the State of Nebraska for approval the amendments of the Constitution of Nebraska which are set forth in section 2 of this act and which are hereby proposed by the Legislature.

Sec. 2. The amendments proposed are as follows:

(1) To amend Article IV, section 11 to read as follows:

"Sec. 11. In case of a vacancy during the recess of the Legislature, in any office which is not elective, except officers provided for in Article V of this Constitution, the Governor shall make a temporary appointment until the next meeting of the Legislature, when he shall nominate some person to fill such such office; and any person so nominated, who is confirmed by the Legislature, a majority of all the legislators elected concurring by voting yeas and nays, shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. No person after being rejected by the Legislature shall be again nominated for the same office at the same session, unless at request of the Legislature, or be appointed to the same office during the recess of the Legislature."

(2) To amend Article V, sections 4, 5, 7, 10, 15, 20 and 21 to read as follows:

"Sec. 4. The Chief Justice and the Judges of the Supreme Court shall be selected as provided in this Article V. They shall

reside at the place where the court is located but no Justice or Judge of the Supreme Court shall be deemed thereby to have lost his residence at the place from which he was selected.

Sec. 5. The Legislature shall divide the state along county lines into six compact districts of approximately equal population, which shall be numbered from one to six, consecutive numbers to be given adjacent districts and shall be the Supreme Court judicial districts. Such districts shall not be changed, except upon the concurrence of two-thirds of the members of the Legislature, nor shall any such change vacate the office of any judge.

Sec. 7. No person shall be eligible to the office of Chief Justice or Judge of the Supreme Court unless he shall be at least thirty years of age, and a citizen of the United States, and shall have resided in this state at least three years next preceding his selection; nor, in the case of a Judge of the Supreme Court selected from a Supreme Court judicial district, unless he shall be a resident and elector of the district from which selected.

Sec. 10. The state shall be divided into district court judicial districts. Until otherwise provided by law, the boundaries of the judicial districts and the number of judges of the district courts shall remain as now fixed. The judges of the district courts shall be selected from the respective districts as provided in this Article V.

Sec. 15. In the year 1964 and every four years thereafter, there shall be selected, in such manner as the Legislature shall provide, in and for each county, one or more judges as the Legislature may provide, who shall be judge of the county court of such county, whose term of office shall be four years and whose salary shall be fixed by the Legislature; *Provided*, that two or more counties may form a county court judicial district when approved by a majority of the electors of each county in the district; *and provided further*, when two or more counties form a county court judicial district, one county judge shall be selected for a term of four years from the district at the same time other county judges are selected, whose salary shall be fixed by the Legislature.

Sec. 20. All officers provided for in this Article shall hold their offices until their successors shall be qualified and they shall respectively reside in the district, county or precinct, from which they shall be selected. All officers, when not otherwise provided for in this Article, shall perform such duties and receive such compensation as may be prescribed by law.

Sec. 21. (1) In the case of any vacancy in the Supreme Court or in any district court or in such other court or courts made subject to this provision by law, such vacancy shall be filled by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission. If the Governor shall fail to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made by the Chief Justice or the acting Chief Justice of the Supreme Court from the same list.

(2) In all other cases, any vacancy shall be filled as provided by law.

(3) At the next general election following the expiration of three years from the date of appointment of any judge under the provisions of subsection (1) of this section and every six years thereafter as long as such judge retains office, each Justice or Judge of the Supreme Court or district court or such court or courts as the Legislature shall provide shall have his right to remain in office subject to approval or rejection by the electorate in such manner as the Legislature shall provide; *Provided*, that every judge holding or elected to an office described in subsection (1) of this section on the effective date of this amendment whether by election or appointment, upon qualification shall be deemed to have been selected and to have once received the approval of the electorate as herein provided, and shall be required to submit his right to continue in office to the approval or rejection of the electorate at the general election next preceding the expiration of the term of office for which such judge was elected or appointed, and every six years thereafter. In the case of Chief Justice of the Supreme Court, the electorate of the entire state shall vote on the question of approval or rejection. In the case of any Judge of the Supreme Court, other than the Chief Justice, and any judge of the district court or any other court made subject to subsection (1) of this section, the electorate of the district from which such judge was selected shall vote on the question of such approval or rejection.

(4) There shall be a judicial nominating commission for the Chief Justice of the Supreme Court and one for each judicial district of the Supreme Court and of the district court and one for each area or district served by any other court made subject to subsection (1) of this section by law. Each judicial nominating commission shall consist of seven members, one of whom shall be a Judge of the Supreme Court who shall be designated by the Governor and shall act as chairman. The members of the bar of the state residing in the area from which the nominees are to be selected shall designate three of their number to serve as members of

said commission, and the Governor shall appoint three citizens, not admitted to practice law before the courts of the state, from among the residents of the same geographical area to serve as members of said commission. The terms of office for members of each judicial nominating commission shall be staggered and such shall be fixed by the Legislature. The nominees of any such commission cannot include a member of such commission or any person who has served as a member of such commission within a period of two years immediately preceding his nomination or for such additional period as the Legislature shall provide."

Sec. 3. That the proposed amendment shall be submitted to the electors in the manner prescribed by Article XVI, section 1 of the Constitution of Nebraska. The proposition for the submission of the proposed amendments shall be placed upon the ballot in the following form:

"Constitutional amendment to provide a merit plan for the selection and term of office of the Chief Justice and Judges of the Supreme Court, judges of the district courts and judges of such other courts as the Legislature may prescribe.

- ☐ For
- ☐ Against"

Sec. 4. That the proposed amendments, if adopted, shall be in force and take effect immediately upon the completion of the canvass of the votes, at which time it shall be the duty of the Governor to proclaim the amendments adopted as a part of the Constitution of Nebraska.

Approved May 5, 1961